



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner
v.
[REDACTED]

DECISION

FOF/151557

PRELIMINARY RECITALS

Pursuant to a petition filed August 22, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on January 21, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Nadine Stankey
Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare benefits in Wisconsin during the period from July 1, 2012 through August 31, 2012.
2. During the period involved here Respondent made purchases using his FoodShare benefits at [REDACTED] a small neighborhood store that since has been disqualified for trafficking FoodShare with FoodShare recipients.

3. [REDACTED] was disqualified for three specific bases that are tied to FoodShare trafficking according to the USDA Food and Nutrition Services (FNS): (1) an unusual number of transactions ending in the same cents value, (2) multiple transactions made by the same purchaser in unusually short time frames, and (3) excessively large purchase transactions. [REDACTED] was a small store of about 2400 square feet, very little fresh produce or meat and one sales register. There were no shopping baskets or carts for customers to place multiple items that would add up to large purchase amounts.
4. [REDACTED]'s address was [REDACTED]; Respondent's address at the time was [REDACTED]. The two addresses are roughly 3 blocks apart.
5. Respondent made purchases or transactions on 10 occasions during the months of July and August 2012 using his FoodShare card at [REDACTED], with transactions totaling \$112.99. Those dates, times and amounts were:

a.	7/3/12	@2105	\$20.00
b.	7/3/12	@2109	\$ 6.00
c.	7/3/12	@2255	\$ 2.50
d.	7/5/12	@1121	\$ 1.00
e.	7/5/12	@1123	\$.50
f.	7/5/12	@1837	\$49.80
g.	7/5/12	@1840	\$27.09
h.	8/4/12	@1118	\$ 2.50
i.	8/4/12	@1118	\$ 2.85
j.	8/4/12	@1131	\$.75
6. On September 17, 2013 the agency issued an Administrative Disqualification Hearing Notice to Respondent advising him of the allegation that he had trafficked her FoodShare and that a hearing was scheduled to review the allegations. Petitioner seeks to disqualify Respondent from receipt of FoodShare for one year.

DISCUSSION

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,

3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

Thus in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

What is needed to prove the first element, that an IPV as defined in 7 C.F.R. §273.16(c) was committed, is clear. In order to prove the second element, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. State v. Lossman, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The FNS did substantial research on trafficking activity and actions associated with trafficking. That [REDACTED] was disqualified as a FoodShare vendor for taking part in trafficking activities with recipients is clear. Nonetheless, this is not a clear cut situation because there is no first hand evidence that the Respondent engaged in trafficking, i.e. no witnesses saw him do so.

The Department bases its argument that Respondent was trafficking on several things: that 89% of the transactions at [REDACTED] were under \$ 11.00 and only 11% over that amount and Respondent had back to back purchases on July 5, 2012 in excess of that amount; second, that Respondent transactions were too often an even dollar amount (i.e., ending on 5 or 10 cent increments) and third, that several of his transactions were too close together in time to make any sense as legitimate transactions. The Department notes that Respondent has had his FoodShare card reissued 81 times and suggests that he sells his FoodShare benefits though it has no proof of that.

Respondent testified that he was having a 4th of July party on July 5, 2012 and that more food was needed for that party. He indicated that as they headed back from [REDACTED] they realized they forgot some things and returned to the store for the additional items. He could not remember the \$20 and \$6 transactions were for because they were so long ago. Finally, he also indicated that he has a knee injury so could not walk to Pick n Save (PNS) nor carry much even if going to PNS on a bus.

This is a close call because of the clear and convincing standard of proof. I am, however, persuaded by the following. Nine of the 10 transactions end on the 5 or 10 cent increment. A 4th of July celebration carrying over to a party at 6 PM on July 5th stretches credulity. While the Department did not present clear evidence as to how FoodShare transactions are processed and time stamped it does not make sense that most of these transactions are within just a few minutes of another transaction. Further, one does not get their FoodShare card replaced 81 times without being very savvy about the workings of the FoodShare program. Finally, Exhibit # 5 shows all of the transactions on Petitioner's FoodShare card(s) during the period from May 1, 2012 through October 31, 2012. It is remarkable that Respondent had so many transactions at other legitimate vendors where the purchase, however small, did not end on the 5 or 10 cent amount - making the purchases at [REDACTED] even more questionable.

CONCLUSIONS OF LAW

That Respondent committed a FoodShare IPV by engaging in FoodShare trafficking at a grocery store that later was disqualified by the FNS for the activities that the Respondent engaged in.

THEREFORE, it is

ORDERED

That the IPV that was the subject of this hearing is sustained and Respondent is hereby ineligible to participate in the FoodShare program for a period of one year, effective the first month following the date of receipt of this decision.

APPEAL TO COURT

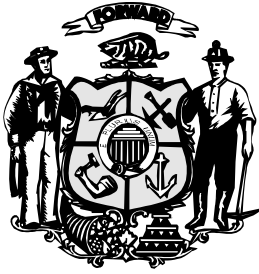
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 29th day of January, 2014

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 29, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability